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In the Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 507 F. 2d 743. The opinion of the district court (Pet. App. C) is reported at 373 F. Supp. 991.

JURISDICTION

The judgment of the court of appeals was entered December 9, 1974 (Pet. App. A). On March 4, 1975, Mr. Justice White extended the time within which to petition for a writ of certiorari to and including April 8, 1975. The petition was filed on that date and was granted on June 2, 1975 (App. 56). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether nuclear waste material, comprehensively regulated and controlled through licenses issued under the Atomic Energy Act by the Nuclear Regulatory Commission, is a "pollutant" within the meaning of the Federal Water Pollution Control Act, which requires the Environmental Protection Agency to establish regulations and controls over pollutants by administering a detailed permit program.

STATUTES AND REGULATIONS INVOLVED

A. STATUTES

The Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. 2011 *et seq.*, provides in pertinent part:

§ 2012. *Congressional findings*

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

* * * * *

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

* * * * * *

§ 2014. *Definitions.*

* * * * * *

(e) The term "byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

* * * * * *

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

* * * * *

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this

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title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear materials" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

* * * * * *

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

§ 2073. *Domestic distribution of special nuclear material.*

(a) *Licenses.*

The Commission is authorized (i) to issue

licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, special nuclear material, (ii) to make special nuclear material available for the period of the license, and, (iii) to distribute special nuclear material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title;

(4) for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.

(b) *Minimum criteria for licenses.*

The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of special nuclear material depending upon the degree of importance to the common defense and security or to the health and safety of the public of—

(1) the physical characteristics of the special nuclear material to be distributed;

(2) the quantities of special nuclear material to be distributed; and

(3) the intended use of the special nuclear material to be distributed.

* * * * *

(e) *License conditions.*

Each license issued pursuant to this section shall contain and be subject to the following conditions—

* * * * *

(2) no right to the special nuclear material shall be conferred by the license except as defined by the license;

(3) neither the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this chapter;

(4) all special nuclear material shall be subject to the right of recapture or control reserved by section 2138 of this title and to all other provisions of this chapter;

(5) no special nuclear material may be used in any utilization or production facility except in accordance with the provisions of this chapter;

(6) special nuclear material shall be distributed only on terms, as may be established by rule of the Commission, such that no user will be permitted to construct an atomic weapon;

(7) special nuclear material shall be distributed only pursuant to such safety standards as may be established by rule of the Commission to protect health and to minimize danger to life or property;

* * * * *

§ 2092. *License requirements for transfers [source material].*

Unless authorized by a general or specific license issued by the Commission, which the

Commission is authorized to issue, no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature, except that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant.

§ 2093. *Domestic distribution of source material.*

(a) *License.*

The Commission is authorized to issue licenses for and to distribute source material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title; or

(4) for any other use approved by the Commission as an aid to science or industry.

* * * * *

§ 2111. *Domestic distribution; license; price limitations [byproduct material].*

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any

byproduct material, except to the extent authorized by this section or by section 2112 of this title [foreign distribution]. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. * * *

Licensees of the Commission may distribute byproduct material only to applicants therefor who are licensed by the Commission to receive such byproduct material. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission or who uses such material in violation of law or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.

§ 2131. *License required.*

It shall be unlawful, except as provided in section 2121 of this title, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 2133 or 2134 of this title.

§ 2132. *Utilization and production facilities for industrial or commercial purposes.*

(a) Except as provided in subsections (b) and (c) of this section, or otherwise specifically authorized by law, any license hereafter issued for a utilization or production facility for industrial or commercial purposes shall be issued pursuant to section 2133 of this title.

* * * * *

§ 2133. *Commercial licenses.*

(a) *Conditions.*

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this chapter [Judicial Review and Administrative Procedure] and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

(b) *Nonexclusive basis.*

The Commission shall issue licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

(c) *License period.*

Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years, and may be renewed upon the expiration of such period.

(d) *Limitations.*

No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. * * *

In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

§ 2134. *Medical therapy, research, and development licenses; limitations.*

(a) The Commission is authorized to issue licenses to persons applying therefor for utilization facilities for use in medical therapy. In issuing such licenses the Commission is directed to permit the widest amount of effective medical therapy possible with the amount of special nuclear material available for such purposes and to impose the minimum amount of regulation consistent with its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public.

(b) As provided for in subsection (b) or (c) of section 2132 of this title, or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter.

(c) The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities useful in the

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conduct of research and development activities of the types specified in section 2051 of this title and which are not facilities of the type specified in subsection (b) of this section. The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

(d) No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title or except under the provisions of section 2139 of this title. No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

§ 2201. *General duties of Commission.*

In the performance of its functions the Commission is authorized to—

* * * * *

(b) *Standards governing use and possession of material.*

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

* * * * *

Sections 101(a)(1) and (2), (b), and (f), 402(a)(1), 502(6), and 511(a)(1) of the Federal Water Pollution Control Act, 62 Stat. 1155, as amended by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 *et seq.*, 33 U.S.C. (Supp. III) 1251(a)(1) and (2), (b), and (f), 1342(a)(1), 1362(6), and 1371(a)(1), provide in pertinent part:

DECLARATION OF GOALS AND POLICY

SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

* * * * *

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * * * *

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act [33 U.S.C. (Supp. III) 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301 (a) [33 U.S.C. (Supp. III) 1311(a)], upon

condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317, 1318, 1343], or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

GENERAL DEFINITIONS

SEC. 502. Except as otherwise specifically provided when used in this Act:

* * * * *

(6) The term "pollutant" means * * * chemical wastes, * * * radioactive materials, heat, * * * and industrial * * * waste discharged into water. * * *.

OTHER AFFECTED AUTHORITY

SEC. 511. (a) This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; * * *.

B. REGULATIONS

Sections 50.34a and 50.36a of Title 10, Code of Federal Regulations, read in part:

§ 50.34a *Design objectives for equipment to control releases of radioactive material in effluents—nuclear power reactors.*

(a) An application for a permit to construct a nuclear power reactor shall include a description of the preliminary design of equipment to

be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences. In case of an application filed on or after January 2, 1971, the applcation shall also identify the design objectives, and the means to be employed, for keeping levels of radioactive material in effluents to unrestricetd areas as low as practicable. The term "as low as practicable" as used in this part means as low as is practicably achievable taking into account the state of technology, and the economies of improvements in relaiton to benefits to the public health and safety and in relation to the uitlization of atomic energy in the public interest.

§ 50.36a *Technical specifications on effluents from nuclear power reactors.*

(a) In order to keep releases of radioactive materials to unrestricted areas during normal reactor operations, including expected operational occurrences, as low as practicable, each license authorizing operation of a nuclear power reactor will include technical specifications that, in addition to requiring compliance with applicable provisions of § 20.106 of this chapter, require:

(1) That operating procedures developed pursuant to § 50.34a(c) for the control of effluents be established and followed and that equipment installed in the radioactive waste system, pursuant to § 50.34a(a) be maintained and used.

(2) The submission of a report to the Commission within 60 days after July 1 of 1971, and within 60 days after January 1 and July 1 of each year thereafter, specifying the quantity of each of the principal radionuclides released to unrestricted areas in liquid and in gaseous effluents during the previous 6 months of operation, and such other information as may be required by the Commission to estimate maximum potential annual radiation doses to the public resulting from effluent releases. If quantities of radioactive materials released during the reporting period are significantly above design objectives, the report shall cover this specifically. On the basis of such reports and any additional information the Commission may obtain from the licensee or others, the Commission may from time to time require the licensee to take such action as the Commission deems appropriate.

(b) In establishing and implementing the operating procedures described in paragraph (a) of this section, the licensee shall be guided by the following considerations: Experience with the design, construction and operation of nuclear power reactors indicates that compliance with the technical specifications described in this section will keep average annual releases of radioactive material in effluents at small percentages of the limits specified in § 20.106 of this chapter and in the operating license. At the same time, the licensee is permitted the flexibility of operation, compatible with considerations of health and safety, to assure that the public is provided a dependable source of power

even under unusual operating conditions which may temporarily result in releases higher than such small percentages, but still within the limits specified in § 20.106 of this chapter and the operating license. It is expected that in using this operational flexibility under unusual operating conditions, the licensee will exert his best efforts to keep levels of radioactive material in effluents as low as practicable.

Sections 125.1(y) and 125.2(a)(1) of Title 40, Code of Federal Regulations, read in part:

§ 125.1 *Definitions.*

* * * * *

(y) The term "pollutant" means * * * radioactive materials * * * discharged into water. * * *

COMMENT.—The legislative history of the [Federal Water Pollution Control] Act [Amendments of 1972] reflects that the term "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act [33 U.S.C. (Supp. III) 1362] covers only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by [Section 11e, s, t (redesignated z, aa) of] the Atomic Energy Act of 1954, as amended [42 U.S.C. 2014(e), (z), (aa)], and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant" are radium and accelerator producted isotopes. (H.R. Rep. 92–911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong. Rec.

17401, daily ed., November 2, 1971; 118 Cong. Rec. 9115, daily ed., October 4, 1972.)

* * * * *

§ 125.2 *Scope and purpose.*

(a)(1) The regulations in this part prescribe the policy and procedures to be followed in connection with applications for federally issued permits authorizing discharges into the navigable waters, the waters of the contiguous zone, and the oceans, during the periods that the Administrator of the Environmental Protection Agency is authorized to issue such permits pursuant to sections 402 and 405 of the Act [33 U.S.C. (Supp. III) 1342, 1345].

STATEMENT

Prior to the decision below, the Atomic Energy Commission—now the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA)[1]—exercised exclusive authority to regulate radioactive effluents released from NRC-licensed electrical power plants and from government research and production facilities operated by contractors for ERDA.[2]

[1] NRC and ERDA succeeded to the powers of the Atomic Energy Commission on January 19, 1975, pursuant to the Energy Reorganization Act of 1974, Pub. L. 93–438, 88 Stat. 1233–1254. See 40 Fed. Reg. 3242, 3520. In this brief, references to NRC will, for clarity, include the AEC before the reorganization. Both NRC and ERDA concur in the views expressed herein.

[2] As discussed *infra*, p. 52, the EPA establishes radiation standards which limit the total amount of radiation in the environment from major categories of sources. See also n. 25, *infra*.

1. THE ATOMIC ENERGY ACT

The Atomic Energy Act of 1946, 60 Stat. 755, established a federal monopoly in the production and use of radioactive materials necessary to provide nuclear energy or created in the production of such energy. In 1954, Congress substantially revised the Act, 68 Stat. 919, providing the base upon which all later amendments have been built, 42 U.S.C. 2011, *et seq.* The 1954 revision permitted private parties to produce and utilize nuclear energy for peaceful purposes. But Congress conditioned private participation on compliance with a comprehensive and stringent federal licensing program designed to protect the common defense and the public health and safety. Under the revised Act, the production, utilization and disposal of source,[3] special nuclear,[4] and byproduct materials[5] may be accomplished only in accordance with licenses issued by the NRC.

[3] "The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time." 42 U.S.C. 2014(z).

[4] "The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U.S.C. 2014(aa).

[5] "The term 'byproduct material' means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process or producing or utilizing special nuclear material." 42 U.S.C. 2014(e).

The NRC has established by regulation maximum permissible releases of radioactivity into the environment by licensees, 10 C.F.R. Part 20, Appendix B, Table II.[6] Although Part 20 establishes the maximum permissible discharges that may be authorized, individual licenses further limit the amount of licensed material[7] which may be discharged. For example, the NRC requires, consistent with the Federal Radiation Council recommendations, that nuclear facilities be designed to insure that levels of radioactive materials in effluents are as low as practicable (10 C.F.R. 50.34a).[8]

[6] These limits are based on the recommendations of the International Commission on Radiological Protection, the National Council on Radiation Protection and Measurements, a federally chartered nonprofit corporation which collects, analyzes, and disseminates information and recommendations concerning radiation protection, 78 Stat. 320, and the Federal Radiation Council, a presidential advisory council composed of the Secretaries of Defense, Commerce, Labor, and HEW, and the chairman of the AEC. EPA succeeded to FRC functions in Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U.S.C. App., p. 609.

[7] The term "licensed material" as used herein means source, byproduct and special nuclear material, the acquisition, use, transfer and disposal of which is comprehensively licensed under the Atomic Energy Act. 10 C.F.R. 20.3(a)(8).

[8] The NRC issues licenses governing the possession and use of source, byproduct and special nuclear materials. The licenses authorize a wide range of activities involving these materials, including medical, research and commercial applications. Under the decision below all these licensed applications would also be subject to EPA licensing to the extent that they regulate discharges of these materials into water. We will, however, focus here, as respondents have below, on the licenses for nuclear power facilities.

In their complaint (App. 6–15), respondents also point to the Rocky Flats Plant—a Federal facility operated for ERDA

The NRC has recently adopted[9] an Appendix I to Part 50, containing numerical criteria which set forth one acceptable method of establishing compliance with the "as low as practicable" standard concerning effluent releases from light-water-cooled power reactors, 40 Fed. Reg. 19439 (May 5, 1975).[10] In so

by a private contractor to fabricate plutonium into nuclear weapon parts. ERDA is also responsible for the operation of approximately 24 other facilities which discharge low levels of source, byproduct and special nuclear materials, including the gaseous diffusion plants which enrich uranium to obtain the fissionable isotope U–235. Under Executive Order 11752 (3A C.F.R. (1973 Comp.), p. 240), all thes efacilities must conform to the same effluent standards imposed on commercial nuclear facilities by the Nuclear Regulatory Commission. ERDA requires effluent and environmental monitoring programs to insure that applicable standards are achieved. In almost all cases, these ERDA facilities achieve discharge levels on the order of one percent of the permissible limits of 10 C.F.R. Part 20.

[9] The new regulation was published for public comment on June 9, 1971 (36 Fed. Reg. 11113), and a public rule-making hearing was announced on November 30, 1971 (36 Fed. Reg. 22775). The hearing before a 3-member hearing board began on January 20, 1972; it was suspended in May 1972 for preparation of an Environmental Impact Statement, which issued July 26, 1973. The hearing thereupon resumed in November 1973, and was completed December 6, 1973, after 25 days of hearings, in which 18 persons, including EPA, made limited appearances, a 4172-page hearing transcript was compiled, and thousands of pages of exhibits were admitted. The Commission heard oral arguments on the proposed regulations on June 6, 1974 (40 Fed. Reg. 19439–19440).

[10] All but one of the commercial nuclear power reactors that currently have operating licenses are light-water-cooled power reactors. The Fort St. Vrain facility uses a high temperature gas-cooled reactor. It is, of course, subject to the general "as low as practicable" requirement of Part 50.

doing, it noted that the International Commission on Radiological Protection has suggested that the formulation "as low as is reasonably achievable"—specifying that both economic and social considerations are to be taken into account—better expresses the basic concept of radiation protection intended. The NRC directed its staff to consider whether the suggested formulation should be substituted for the "as low as practicable" criterion in all of its regulations. It noted that the numerical values it was therein adopting "will not, of course, be affected by the forthcoming change in terminology." 40 Fed. Reg. 19440.

A utility wishing to construct a nuclear power facility must apply to the NRC for a construction permit, and submit a detailed report concerning all aspects of the proposed plant."

The NRC's regulatory staff reviews the application and issues a formal safety evaluation and an environmental impact statement (10 C.F.R. Part 51; 42 U.S.C. 4332(2)(*c*)). On the average, the staff in-

[11] The application must include (10 C.F.R. 50.34a(a)): "[A] description of the preliminary design of equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences. In the case of an application filed on or after January 2, 1971, the application shall also identify the design objectives, and the means to be employed, for keeping levels of radioactive material in effluents to unrestricted areas as low as practicable. The term 'as low as practicable' as used in this part means as low as is practicably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety and in relation to the utilization of atomic energy in the public interest." This regulation was amended on May 5, 1975, to require consideration of Appendix I, Part 50 (see p. 22, *supra*). 40 Fed. Reg. 19442.

vests approximately 20 man-years of professional effort in the safety review. The Advisory Committee on Reactor Safeguards (an independent group of authorities on various aspects of nuclear technology and safety) also reviews the application, and issues its recommendations (42 U.S.C. 2039, 2232(b)). Following this review, a public adjudicatory hearing on the proposal is held before a three-member hearing board composed of two technical experts and a chairman, who is an attorney.[12] A construction permit may issue only if the hearing board concludes that the applicant is equipped to observe, and will observe, established safety standards to protect health and to minimize danger to life and property (42 U.S.C. 2133(b)). The construction permit incorporates the application as amended on the basis of these reviews, which specifies in detail the requirements for the construction of the plant, including effluent control systems. 10 C.F.R. Part 50. The actual process of construction is closely supervised by Commission personnel who visit the site frequently to determine whether construction complies with the construction permit. The subsequent issuance of an operating license (with a maximum term of 40 years) is contingent upon the NRC's finding[13] that construction has conformed to the construction permit, and that the facility will operate in conformity with the

[12] The NRC's rules provide for intervention by interested individuals and groups as well as a more informal "limited appearance." 10 C.F.R. 2.714, 2.715.

[13] An opportunity for a public hearing must be provided before such a finding is made. 42 U.S.C. 2239.

Atomic Energy Act and NRC regulatory requirements.[14] One such requirement is compliance with operating procedures, developed and approved at the construction permit stage, to keep radioactive effluent discharges as low as practicable (in practice, a minute fraction of NRC's effluent limits); in addition, there must be assurance that such discharges will be monitored and reports of amounts of radioactive materials discharged will be made to the NRC every six months. 10 C.F.R. 50.36a.

2. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The Federal Water Pollution Control Act, as amended in 1972 (86 Stat. 816 *et seq.*, 33 U.S.C. (Supp. III) 1251–1376) (FWPCA), established a regulatory system to control, and eventually eliminate, water pollution. The FWPCA includes a broad definition of pollutants, including, *inter alia,* chemical wastes, radioactive materials, heat, and industrial waste. 33 U.S.C. (Supp. III) 1362(6). The Administrator of EPA is directed to establish guidelines to limit the content of pollutants in effluent discharges into water. These

[14] The Atomic Energy Act's requirements (42 U.S.C. 2235, 2232(a), 2134(d)) are restated in the NRC's regulations (10 C.F.R. 50.57(a)), which condition issuance of an operating license upon findings, *inter alia*, that:

"(3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and"

"(6) The issuance of the license will not be inimical to * * * the health and safety of the public."

guidelines are to be developed after consultation with appropriate federal agencies and opportunity for public hearings. 33 U.S.C. (Supp. III) 1314(b). The guidelines must identify the degree of reduction of pollutant discharges attainable for various classes of sources, and the factors to be taken into account in determining required control measures within such classes in three stages: using the best practicable control technology, using the best control technology available,[15] and achieving total elimination of pollutants from discharges.

Once the guidelines are established, effluent limitations are to be defined so as to require application

[15] The Administrator has explained the meaning of these terms in the uniform Request for Proposal which is issued to invite proposals from contractors to write technical support documents for effluent regulations under Sections 301 and 304 of the Federal Water Pollution Control Act (33 U.S.C. (Supp. III) 1311, 1314). A copy of the Request for Proposal is herewith lodged with this Court (at pp. 9–11). The best practicable control technology currently available (BPT) is defined by the Agency in most cases as the effluent control attained by the average of the best performing plants in an industrial category. The agency considers, in establishing this level, both "end-of-pipe" treatment facilities and "in-plant" waste management techniques considered to be normal practice within an industrial category. The best available technology economically achievable (BAT) is the best control and treatment technology employed by a specific point source within an industrial category, or capable of being transferred from another industrial category. The Agency considers the full-range of potential in-plant controls, as well as end-of-pipe treatment facilities. Both BPT and BAT are established only after evaluation of such factors as the size and age of facilities involved, the cost of controls, and the nonwater quality environmental impact.

of the best practicable control technology by July 1, 1977, and, by July 1, 1983, the best available technology economically achievable. 33 U.S.C. (Supp. III) 1311(b). The Act further states that it is the national goal to eliminate all discharges of pollutants by 1985. 33 U.S.C. (Supp. III) 1251(a)(1).

These limitations are applied through a permit program; the discharge of pollutants without a permit is unlawful. 33 U.S.C. (Supp. III) 1311(a). Initially, permits are to be issued by the EPA, but as the States develop programs that comply with the FWPCA, permit-issuing authority is to be turned over to them. 33 U.S.C. (Supp. III) 1342.[16] In the meantime, permits for a maximum term of 5 years, are issued by EPA after an opportunity for a public hearing. These define what materials may be discharged, and in what quantities; establish monitoring and reporting requirements; and, as necessary, require adherence to specified schedules for compliance with the 1977 and 1983 deadlines. 33 U.S.C. (Supp. III) 1342(a); 40 C.F.R. Part 125.[17]

[16] The permit program for Colorado, where this case originated, was approved by EPA on April 8, 1975, and is currently in effect. 40 Fed. Reg. 16713.

[17] In addition, EPA is directed to establish federal standards of performance for new sources in specifically defined categories, such as steam electric powerplants, meat product and rendering processing, feedlots, textile mills, chemicals manufacturing, and petroleum refining. These standards will require that such facilities are designed, built, equipped and operated so as to minimize the discharge of pollutants. 33 U.S.C. (Supp. III) 1316(a)(1). Although the Act lists 27 categories of new sources, the Administrator is expected to add other types of facilities to this list as he develops the capability to establish standards for them. 33 U.S.C. (Supp. III) 1316(b).

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On May 22, 1973, the Administrator of the EPA adopted regulations prescribing the policy and procedures to be followed in the issuance of federal permits authorizing discharges into the Nation's waters. 40 C.F.R. Part 125. Byproduct, source, and special nuclear material are excluded from the program established by the regulations, in accord with the legislative intent of the FWPCA as reflected in its legislative history. 40 C.F.R. 125.1(y), comment.

3. THE PROCEEDINGS BELOW

Respondents, plaintiffs below, are Colorado-based organizations and Colorado residents claiming potential harm from effluent discharges from the Fort St. Vrain Nuclear Generating Station, owned and operated by an NRC licensee, and from the Rocky Flats nuclear weapons plant, owned by the government and operated by an ERDA contractor (App. 9–11). They brought this suit under Section 505 of the FWPCA, 33 U.S.C. (Supp. III) 1365, which consents to "citizen suits" against EPA to require it to perform nondiscretionary duties under the FWPCA. Respondents alleged that the FWPCA requires the EPA to regulate all radioactive materials, including those regulated under the Atomic Energy Act, to control discharges of such materials into water, and to subject them to "the various steps required by the Act leading to the complete elimination of all pollutants from the Nation's navigable waters by 1985" (App. 13).

On cross-motions for summary judgment (App. 16–18), the district court granted EPA's motion for summary judgment and dismissed respondents' complaint (App. 19). The court concluded that "two agencies of peculiar and extreme expertise" (Pet. App. 21a), the AEC and the EPA, were correct in their conclusion that the FWPCA does not apply to source, special nuclear, and byproduct material. The court relied upon the legislative history of the FWPCA (Pet. App. 22a) and on the "wasted effort, * * * confusion, and possible danger to the public" likely to result from dual regulation (Pet. App. 23a). The court also stated that requiring EPA to regulate effluents from AEC-licensed plants might have an adverse effect on energy supplies (Pet. App. 26a).

The court of appeals reversed, holding that the plain meaning of the FWPCA requires the EPA to regulate discharges of all radioactive materials, including those controlled by the AEC.[18] Therefore, the court of appeals decided, "there is no need to address ourselves to the ofttimes difficult task of ascertaining legislative intent through legislative history" (Pet. App. 12a). In the court's view, exclusive control over these materials had not been reserved to the NRC by the Atomic Energy Act of 1954 because the FWPCA constituted a later expression of congressional intent to "vest the Environmental Protection Agency with the duty of regulating the dis-

[18] The States of Arkansas, Kansas, Michigan, Minnesota, Pennsylvania, and Washington participated as *amici curiae* in the court of appeals (App. 1), claiming that the 1972 amendments to the FWPCA required EPA—and eventually the States, under EPA-approved state permit programs—to control discharges of all radioactive effluents into water.

charge of all radioactive materials into navigable waters" (Pet. App. 16a). The court concluded that the FWPCA was to that extent inconsistent with the Atomic Energy Act (*id.* at 14a). The court remanded the case for further proceedings in the district court.

One month after the decision by the court of appeals, the Atomic Energy Commission went out of existence, and its regulatory and licensing functions were transferred to the newly established Nuclear Regulatory Commission (see note 1, *supra*).

SUMMARY OF ARGUMENT

In contrast to the usual case involving questions of statutory interpretation, the issue here does not require the Court to determine how Congress *would have* dealt with a matter it did not specifically consider. Instead, we have here a broad statutory term, the meaning of which Congress thoroughly considered, and this legislative history clearly indicates the term is not applicable to the materials here involved. Thus, although the statutory definition of "pollutants" which may not be discharged into water without a permit from EPA includes "radioactive materials" (33 U.S.C. (Supp. III) 1362(6)), the legislative history plainly reveals that this term does not include source, byproduct or special nuclear materials, which are already comprehensively regulated by the NRC pursuant to the Atomic Energy Act. This understanding that NRC-licensed materials were not considered "pollutants" is stated expressly in the pertinent House Report (1 Leg. Hist. 753, 818 [19]), it is reflected in the bill's sponsors' assurances in debate in both houses (1 Leg. Hist. 587–588; 2 Leg. Hist. 1265–1266), it served as the articulated premise in the House discussion and rejection of an amendment proposed by those who wished to limit NRC authority over these materials (1 Leg. Hist. 544–557), and it was confirmed in an explanation of the Conference Committee's report on the final bill (1 Leg. Hist. 226–227). This clear expression of legislative intent, we submit, definitively settles the meaning of the term used in the Act.

This interpretation, moreover, is entirely consistent with the legislative scheme, under which comprehensive regulation of the acquisition, use, transfer and disposal of source, byproduct and special nuclear material is comprehensively regulated by the NRC, while the EPA has the responsibility to establish standards limiting the total amount of permissible radiation in the environment. Under this division of authority, NRC controls the amount of source, byproduct or special nuclear material that may be contained in the discharges from any licensed user of such materials, assuring that the total contributions of effluent by all such users do not exceed EPA standards. This regulatory system, although requiring close cooperation

[19] "Leg. Hist." refers to the two-volume Committee Print entitled "A Legislative History of the Water Pollution Control Act Amendments of 1972 Together With A Section-by-Section Index," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess. (1973).

between the two agencies, avoids redundant regulation of the same users of the same materials to achieve the same ends—a redundancy that could lead only to wasteful duplication if the same limitations were imposed by both agencies, or confusion and inefficiency if the agencies attempted to impose different limitations and subject the same facilities to different requirements.

ARGUMENT

NUCLEAR WASTE MATERIALS COMPREHENSIVELY REGULATED AND CONTROLLED BY THE NRC ARE NOT "POLLUTANTS" WITHIN THE MEANING OF THE FEDERAL WATER POLLUTION CONTROL ACT

I

INTRODUCTION

Significant legal disputes about the meaning of statutes usually require courts to resolve issues that Congress neither expressly discussed nor specifically anticipated. In the typical case, as Judge Learned Hand put it, "Legal interpretation involves an imaginative projection upon the occasion that has arisen of what *would have been* the choice of the lawmakers."[20] But with respect to the case at hand, these observations are wide of the mark. This is not a typical case of statutory construction; here, there is no need to engage in the sometimes difficult task of di-

[20] Remarks upon the presentation of a portrait of Mr. Justice Frankfurter in 1960, quoted in Mishkin & Morris, *On Law in Courts* 449 (1965) (emphasis supplied).

vining what Congress would have thought about a matter it did not precisely consider. For the question presented by this case was the subject of direct and explict congressional attention.

As we fully discuss later, the House Report stated in no uncertain terms that the 'radioactive materials" to be considered "pollutants" under Section 502(6) of the Act (33 U.S.C. (Supp. III) 1362(6)) did not include source, byproduct or special nuclear materials already regulated comprehensively by the NRC pursuant to the Atomic Energy Act. In the Senate, the bill's sponsor gave assurances that the legislation would not "in any way affect" the AEC's regulatory authority or a recent court of appeals decision (holding that the AEC had exclusive authority to license the nuclear materials listed in the House Report), a decision not only deliberately left standing by the Senate Committee, but also later affirmed by this Court. Moreover, the House rejected an amendment to give States regulatory authority over such nuclear materials and, during the floor debate on the amendment, both sides expressed the understanding that the bill itself did not include AEC-licensed materials as "pollutants" that EPA would also regulate. After the Conference Committee reported out the final bill, a ranking Member of that Committee stated on the House floor—in response to a question directly on point—that the Conferees had adhered to the exclusion of AEC-licensed material from the "radioactive materials" that would be considered "pollutants."

Despite this direct and explicit legislative history, the Court will search the opinion below in vain for a

single citation to any of the foregoing congressional materials. To the court of appeals, the statute was "clear" and "unambiguous," and had a "plain and obvious meaning" (Pet. App. 9a–10a)—a meaning precisely the opposite of the congressional understanding indicated above. And since the meaning of the statute was plain to the court below, it decided not to "concern [itself] with the legislative history of the 1972 Amendments" (*id.* at 12a).

But as Mr. Justice Holmes observed, the plain meaning doctrine "is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41, 48.[21] Here such evidence does exist. Moreover, the underlying assumption of the plain meaning doctrine "is that a statutory meaning which seems necessary to an interpreting judge will also have seemed necessary to any other person who may have referred to the language of the

[21] Accord *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543–544 ("[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"). See also *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, No. 73–1380, decided March 3, 1975, slip op. 7–8; *Cass* v. *United States*, 417 U.S. 72, 75–76; *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479; *United States* v. *Dickerson*, 310 U.S. 554, 561–562; *United States* v. *Fisher*, 2 Cranch 358, 386 (Marshall, C.J.); and Judge Learned Hand's concurring opinion in *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C.A. 2), affirmed *sub nom. Gemsco, Inc.* v. *Walling*, 324 U.S. 244.

statute for guidance in his action."[22] It is thus significant that the words in the statute we deal with here were intended not to "serve as directions for ordinary people,"[23] but as instructions to the EPA Administrator, who could be expected to have an in-depth knowledge of the Act and its legislative history.[24]

With these considerations in mind, we now proceed to discuss in greater detail the meaning of the statute and the policy factors that make it still more unlikely that Congress could have intended the result reached by the court below.

II

IN ENACTING THE FWPCA, CONGRESS SPECIFICALLY DECIDED NOT TO GIVE EPA AUTHORITY TO REGULATE NUCLEAR MATERIAL LICENSED BY NRC

Under the Atomic Energy Act, the NRC has authority—and no one could contend otherwise—to regulate through a licensing system the release into water of source, byproduct and special nuclear materials (see pp. 20 to 25, *supra*). The question here is whether the NRC's authority remains exclusive or whether, in enacting the Federal Water Pollution

[22] Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 Wash. U. L. Q. 2, 22–23 (1939).

[23] *Estep* v. *United States*, 327 U.S. 114, 136 (Mr. Justice Frankfurter, concurring).

[24] See Hart & Sachs, *The Legal Process* 1413 (tent. ed. 1957) ("The need for clarity is at its greatest in words addressed to private persons. Words addressed primarily to judges, on the other hand, may fairly presuppose the powers of analysis and ratiocination which judges supposedly have. Words addressed to officials of other kinds may presuppose the characteristic capacity for understanding of these officials.").

Control Act Amendments of 1972, Congress altered the existing regulatory system for such nuclear material and created a new system under which the NRC's licensing program would exist side-by-side with a permit program established under the new Act, and administered by EPA, controlling the same nuclear materials and regulating the same facilities for the same purposes at the same time.[25]

The question arises because the definition of "pollutant" in Section 502(6) of the Act (33 U.S.C. (Supp. III) 1362(6)) includes, *inter alia,* "radioactive materials," and the materials licensed by the NRC under

[25] The issue is not, as respondents suggest (Brief in Opp. 6), whether the nuclear power industry is exempt from the FWPCA. No such claim is made. Indeed, as we discuss later, respondent's misinterpretation of the legislative history may be due to the failure to recognize the careful distinction reflected therein between the *thermal* effects of discharges from nuclear facilities, which are clearly subject to control under the FWPCA, and the discharges of NRC-licensed materials, which are not. Of course, discharges of pollutants, as defined in the FWPCA, are comprehensively regulated under that Act, whether the pollutants are discharged from nuclear facilities or not. See 38 Fed. Reg. 2679. But NRC-licensed materials are not "pollutants" as defined in the Act.

Nor is it significant, as respondents suggest (Brief in Opp. 7–8), that the FWPCA makes it unlawful to discharge "any radiological * * * warfare agent or high-level radioactive waste into the navigable waters." 33 U.S.C. (Supp. III) 1311 (f). Such discharges would be equally improper under the Atomic Energy Act and the regulations issued thereunder; the flat prohibition in the FWPCA does not require the EPA to evaluate the technology for the control of such discharges and establish its own, possibly conflicting, limitations on them, as it must for "pollutants" defined in Section 502(6).

the Atomic Energy Act are radioactive.[26] While it is true that a broad reading of the Section 502(6) phrase "radioactive materials" to encompass NRC-licensed materials would result in requiring EPA to administer a permit program that overlapped the NRC's existing licensing system, the phrase was not further defined and the Act itself therefore does not clearly indicate whether such a broad construction is the correct reading.

Congress did specifically state, however, that the Act is not to be construed as limiting the authority of any federal agency under any other law not inconsistent with the Act. 33 U.S.C. (Supp. III) 1371(a)(1). Congress also directed that the Act be implemented in a way that "prevents needless duplication and unnecessary delays at all levels of government." 33 U.S.C. (Supp. III) 1251(f). Since the Act supplements but does not override or duplicate related but not inconsistent statutory provisions, it would therefore seem at least doubtful that Congress meant to require the EPA to regulate the type of nuclear waste material already extensively and comprehensively controlled by the NRC under the Atomic

[26] Radioactive materials not regulated under the Atomic Energy Act include certain naturally occurring and accelerator produced materials, such as radium and some isotopes. EPA is preparing effluent guidelines for radium, uranium and thorium released in ore mining and milling operations. Accelerator isotopes occur primarily in hospital effluents in combination with NRC-licensed materials. NRC licenses issued to such users prohibit discharges of NRC-licensed materials which, when added to all other isotope discharges, will result in radioactivity levels in excess of specified amounts.

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Energy Act. When the pertinent legislative history is consulted, there is no longer any doubt whether Congress intended such a result: it becomes certain it did not. We turn first to the committee reports since, as Judge Friendly has stated, "if an intent clearly expressed in committee reports is within the permissible limits of the language and no construction manifestly more reasonably suggests itself, a court does pretty well to read the statute to mean what the few legislators having the greatest concern with it said it meant to them." [27]

The House Committee Report could scarcely be more explicit: [28]

> The term "pollutant" as defined in the bill includes "radioactive materials." *These materials are those not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission.* Examples of radioactive material not covered by the Atomic Energy Act, and, therefore, included within the

[27] Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," in *Benchmarks* 216 (1967). Judge Learned Hand made a related point: "courts * * * recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way." *Securities & Exchange Commission* v. *Robert Collier & Co.*, 76 F. 2d 939, 941 (C.A. 2).

[28] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 131 (1972), 1 Leg. Hist. 753, 818 (emphasis added).

> term "pollutant," are radium and accelerator produced isotopes.

The statutory definition of "pollutant" to which the House Report refers is the same, in all pertinent respects, as that contained in the present Section 502 (6). [29]

During the House consideration of the bill as reported by the House Committee on Public Works, Representative Wolff offered an amendment that would have added to what is now 33 U.S.C. (Supp. III) 1370 [30] an additional paragraph providing in effect that the States would have authority to set limitations on the

[29] The same language was contained in the Senate bill but the Senate Committee Report, in its discussion of the provision, states only that it defined "pollutants" and "has extracted from the Refuse Act [33 U.S.C. 407] the basic formula and added municipal discharges to it * * *." S. Rep. No. 92-414, 92d Cong., 1st Sess. 76 (1971), 2 Leg. Hist. 1419, 1494.

At another point, in discussing a different provision (33 U.S.C. (Supp. III) 1316), the Senate Report states that the Committee did not include in its list of new sources "nuclear fuels processing plants" because the EPA "does not have the technical capability to establish controls for such plants at this time." S. Rep. No. 92-414, *supra*, at 59, 2 Leg. Hist. 1477. The Report then stated that it is expected that EPA will develop "the capability that is required to implement the purpose of this Act." *Ibid.* This of course sheds no light on the question presented here since, with the exception of source, byproduct and special nuclear materials, no one disputes that the Act empowers EPA to control the content (and heat) of effluent discharges from the plants referred to by the Senate Committee and that standards of performance for such controls could be established by EPA, although it has not yet done so. See 33 U.S.C. (Supp. III) 1316.

[30] 33 U.S.C. (Supp. III) 1370 generally provides that the states retain authority to prescribe more stringent discharge limitations regarding "pollutants" than those prescribed under the Act.

discharges of radioactive materials. In introducing and explaining his amendment, Representative Wolff observed that "[i]t does seem strange to me, though, that the bill fails to prohibit the routine discharge of radioactive wastes from nuclear powerplants into the water" (1 Leg. Hist. 544)—a statement indicating that he understood the meaning of the Act to be that stated in the House Report. Representative Wolff argued further that seventeen years had elapsed since the passage of the Atomic Energy Act, that States should have the option of setting standards for nuclear power plants more restrictive than those set "on the Federal level," and that the time had come "to seriously consider standards more stringent than those promulgated by the AEC" (*id.* at 544–545).

The Wolff Amendment was defeated by a 3 to 1 margin (*id.* at 557). During the debate, however, no one disputed Representative Wolff's understanding of the bill itself. Opponents of the amendment, as had Representative Wolff, indicated that the bill did not give the EPA authority to regulate AEC-licensed materials. Representative Stanton stated (*id.* at 554–555):

> The amendment presents the House with a very complex and difficult proposition. It proposes to take authority for the setting of pollution control standards from the AEC and places it in the hands of EPA. For normal operations involving pollution, that control properly belongs under EPA. But atomic energy is a peculiar field. To date, the operation of the atomic energy program has been under the control of the Commission itself. Eventually, such control

> will be delegated to the States as more and more knowledgeable people at the State level become involved in the atomic energy program. That time, however, has not yet arrived. Until we reach that stage it is obvious that the control of which we speak should remain with the Atomic Energy Commission itself, as the committee points out on page 131 of House Report 92–911 which accompanies this bill. For this reason, I would oppose the amendment offered by my distinguished colleague.

Representative Price was just as explicit (*id.* at 556):

> The bill as reported establishes a program of effluent limitations and standards, and section 510 clearly provides that the States may set more restrictive standards should they so desire. The proposed amendment is aimed at two so-called pollutants—radioactive materials and thermal discharges—and seeks to collaterally amend any statute enacted by the Congress relative to them without any specific reference to the statutes that might be affected. As to radioactive materials, the target of the amendment is obvious. It seeks to reverse the decisions of the courts which have held that the Atomic Energy Act of 1954 preempted to the Federal Government, acting through the Atomic Energy Commission, the exclusive jurisdiction to regulate most radioactive materials. Clearly, if such is the will of the House, it should be undertaken only after a thorough examination of the impact of such a decision and it should be done directly by amending the statute involved—the Atomic Energy Act—not collaterally through this legislation. If this amendment had been proposed as

> a piece of original legislation, it would have been referred to the appropriate committee for hearings and evaluation of all the pertinent factors involved in such a decision. I could go on with the explanation of those factors, but this is not the time nor the place for such a consideration in the first instance. This bill is not the appropriate vehicle for amending a major piece of legislation, thoroughly considered in committee and by the Congress, which established at the direction of the Congress a thorough and pervasive regulatory program relative to radioactive materials.

And Representative McCormack, in urging the amendment's defeat, stated as follows (*id.* at 550–551):

> Thousands of man-years of highly qualified work have gone into a study of each radioisotope, its half-life, its disintegration energy levels, its daughters, its biological paths and its biological concentrations and their effects. Nothing exists outside of this meticulous work which remotely compares to it in quality, accuracy or thoroughness with regard to safety considerations. Nothing in any State remotely compares to the work of the Atomic Energy Commission. AEC safety standards are totally consistent in detail with the safety standards for the International Agency for Atomic Energy.
>
> To accept the Wolff-Frenzel amendment would amount to throwing away all of this rational work and substituting for it what is at best semi-informed opinion, and what is many times nothing more than hysteria.

* * * * *

> I would like to conclude by saying that it is obvious from the report by the House Committee on Public Works for this bill, and from the committee report from the other body that this bill does not impact directly upon the Atomic Energy Act of 1954. This bill applies only to radioactive materials not covered by the Atomic Energy Act of 1954 and, as such, the amendment is not relevant to this bill at all.

Two points about this debate are especially significant. First, the language we have quoted from the House Report regarding the type of radioactive materials covered by the Act was cited and relied upon by the House Members, which makes it all the more persuasive since the Report did not, in Judge Friendly's words, represent the statute's meaning to just a "few legislators." Second, and just as important, during the debate no one on either side suggested that the bill itself would allow regulation of AEC-licensed materials.[31]

[31] In a later colloquy, Representatives Harsha, Holifield and Jones (*id.* at 587–588) repeated that "radioactive materials," as used in the Act, did not refer to material within the jurisdiction of the AEC. The next day, Representative Frenzel, a cosponsor of the defeated Wolff Amendment, expressed the opposite view (*id.* at 745–746). However, Representative Frenzel had stated during the debate on the Wolff Amendment that Representative Wolff's introductory statement was "exactly correct" (*id.* at 549) and, as quoted in the text (p. 40, *supra*), Representative Wolff had indicated that the bill did not govern discharges of AEC-licensed materials from nuclear power plants. Whether Representative Frenzel's later remarks were what has been termed "manufactured" legislative history is not important (see Friendly, *supra*, at 216 n. 114); his remarks lack force in any event in light of his apparent shift of position after the defeat of the amendment that was proposed to bring about the result he later claimed the bill itself achieved.

In the Senate also, the question arose whether AEC-licensed materials would, under the Act, be regulated as well by EPA. Noting that the definition of "pollutant" in Section 502(f) of the Senate bill included "radioactive materials," Senator Pastore asked the bill's sponsor, Senator Muskie, "Does this measure that has been reported by the committee *in any way affect* the existing law, that is, the existing Atomic Energy Act of 1954, insofar as the regulatory powers of the AEC are concerned with reference to radioactive material?" (2 Leg. Hist. 1265–1266) (emphasis added). The following exchange then took place (*id.* at 1266):

> Mr. MUSKIE. It does not; and it is not the intent of this act to affect the 1954 legislation.
>
> Mr. PASTORE. In other words, this bill does not change that feature of the Atomic Energy Act in any regard?
>
> Mr. MUSKIE. That is correct.
>
> Mr. PASTORE. I thank the Senator.
>
> Mr. MUSKIE. May I say in addition, that legislation dealing with the setting of effluent limitations as they involve nuclear powerplants is now pending in the courts. The Senator is aware of that litigation.
>
> For example, a recent decision of the U.S. Court of Appeals for the Eight Circuit, in the case of Northern States Power and Light versus Minnesota,[32] raises the issue. I would like to

[32] The case referred to by Senator Muskie is *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (C.A. 8), which this Court later affirmed, 405 U.S. 1035. The court of appeals there held that the state could not require a nuclear power plant to

> point out that the committee considered speaking specifically to that decision, but chose to remain silent so as not to prejudice the decision or any appeal from it.
>
> Mr. PASTORE. Yes. As a matter of fact, that decision held that the Federal Government did preempt in this field under existing law. That is the opinion, and we hope this legislation does not change that opinion in any way, and does not affect existing law. That is all I am concerned with.
>
> Mr. MUSKIE. The Senator is correct in his evaluation of the legislation on that point.

While respondents have suggested that this exchange indicates only that "the FWPCA does not alter the licensing authority of the AEC" (Br. in Opp. 16),[33] this is hardly consistent with Senator Muskie's assurance that the new Act would not "in any way affect" the licensing power of what is now the NRC over nuclear materials, a power that was then exclusive. Indeed, respondents themselves recognize that their interpretation of the Act would affect the NRC's licensing authority under the Atomic Energy Act since NRC, according to respondents, would have to

obtain a state permit for the discharge of source, byproduct and special nuclear materials since these were within the exclusive regulatory authority of the AEC under the Atomic Energy Act, which the court described as a pervasive regulatory scheme. 447 F. 2d at 1152–1154.

[33] Respondents also refer to a discussion with Senator Buckley, in which Senator Muskie said that "with respect to the subject matter which the Senator has raised" the AEC must abide by EPA effluent limitation controls (1 Leg. Hist. 198). The subject matter raised was thermal pollution.

issue licenses conforming to permits issued under the FWPCA (*id.* at 12)."

As noted previously, the Conference Committee retained the language in the House and Senate bills defining "pollutants" to include "radioactive materials" and stated only in this regard that the final version was "the same" as the House and Senate versions. S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 143 (1972), 1 Leg. Hist. 326. Significantly, the Conference Report indicated no disagreement about whether AEC-licensed materials were to be covered by the Act. The

[34] Other remarks of Senator Muskie, upon which respondents rely (Br. in Opp. 8–9), are not inconsistent with his assurances to Senator Pastore. Senator Muskie did state that the EPA "is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of *pollutants* into the waters of the United States" (1 Leg. Hist. 183) (emphasis added); but, as the dialogue with Senator Pastore reveals, Senator Muskie agreed that AEC-licensed materials are not "pollutants" within the terms of the Act.

For the same reason, it is not significant that the Senate Report mentioned no specific exclusion of AEC-regulated materials similar to that in the House Report. That omission, rather than indicating any conclusion that AEC-regulated materials *should* be considered pollutants within the FWPCA, showed that the Senate Committee wished to abide by the judicial judgment concerning the allocation of state and federal responsibility in that area. Since, as noted above, the FWPCA is based on the primary state responsibility for pollution control, it may be that if this Court had concluded in *Northern States* that the states could regulate radioactive effluents from nuclear plants, the above exchange would be some indication that the Senate intended to treat these effluents as "pollutants." But *Northern States* held that the responsibility under the Atomic Energy Act was exclusive, and Senator Muskie's remarks indicate the Senate Committee intended no change in that result.

reason is apparent from the following remarks of Representative Harsha, a ranking Member of the Conference Committee, in response to a question from Representative Anderson, who expressed his understanding that the Act would not give EPA authority to regulate AEC-licensed materials[35] (1 Leg. Hist. 226–227):

> The gentleman is quite correct. The conference report does not change the original intent as it was made clear in the colloquy between Senators Muskie and Pastore in the course of the debate in the other body. I also note that an amendment to H.R. 11896 was offered on March

[35] Representative Anderson stated in full (*id.* at 226): "Mr. Speaker, I note that pollutant is defined in section 502(6) so as to include radioactive materials. This was also true of both S. 2770 as passed by the Senate and the House so there has been no change in this respect. S. 2770 as passed by the Senate did not amend the Atomic Energy Act as interpreted in Northern States Power against Minnesota and as affirmed by the Supreme Court with respect to State authority over nuclear materials and facilities, as was made clear by a colloquy between Senators Muskie and Pastore in the course of debate on the measure, and in the House an amendment to H.R. 11896 intended to give States authority beyond that allowed by the Atomic Energy Act was rejected. The conferees' statement does not indicate that any change in this matter is intended—indeed section 101 (f), declaring a national policy to prevent needless duplication and unnecessary delays at all levels of government, reinforces the earlier House and Senate action on this matter. Nevertheless, I should like to confirm my understanding that the bill as reported by the conferees is not intended to change the careful division of authority between the States and the Federal Government over nuclear materials and facilities under the Atomic Energy Act as enunciated in Northern States Power against Minnesota and affirmed by the Supreme Court."

28, 1972, which would have overturned the Northern States Power against Minnesota case.

The distinguished gentleman from California (Mr. Holifield) spoke in opposition to the amendment and pointed out the necessity of not changing the careful division of authority between the States and the Federal Government over nuclear materials and facilities as enunciated in the Northern States case. The amendment was defeated by a 3-to-1 vote of the House.

I can say to the gentleman from Illinois that the managers in no way detracted from the intent of the language in H.R. 11896. I also note that the Committee on Public Works in its report on H.R. 11896 stated on page 131 that the term "pollutant" as defined in the bill includes "radioactive materials." These materials are not those encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. Examples of radioactive materials not covered by the Atomic Energy Act, and, therefore, included within the term "pollutant" are radium and accelerator produced isotopes. This language adequately reflects the intent of the managers of the conference report.

Again, no one indicated any disagreement with this view and the House proceeded to consider other sections and to agree with the Conference Committee's report (*id.* at 276).

We should also note that in 1973, during the House debates on the Energy Reorganization Act of 1974 (Pub. L. 93-438, 88 Stat. 1233-1254), the House rejected an amendment that would have in effect redefined "radioactive materials" to include NRC-licensed material and transferred from the NRC to the EPA authority to establish emission limitations for such materials. 119 Cong. Rec. H11749-H11750 (daily ed., December 19, 1973).

III

CONGRESS COULD NOT HAVE INTENDED TO CREATE THE REDUNDANT REGULATORY SCHEME ORDERED BY THE COURT BELOW

While we believe the foregoing discussion firmly supports our position that the Act does not require the EPA to regulate NRC-licensed materials, that this is the correct interpretation is even more apparent from an examination of the Atomic Energy Act and the FWPCA and the regulatory system that would exist under a contrary construction.

An express purpose of the Atomic Energy Act was to provide for "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with * * * the health and safety of the public." 42 U.S.C. 2013(d). To ensure that this statutory goal was achieved, Congress directed the AEC to establish all necessary rules and regulations to govern the possession and use of special nuclear material, source material and byproduct materials. 42

U.S.C. 2201(b).[36] In response to this directive, the AEC—now the NRC—has promulgated a comprehensive body of regulations establishing detailed safety and licensing criteria. 10 C.F.R. Parts 20–100.[37]

As this Court stated in *Power Reactor Development Co.* v. *Electricians Union,* 367 U.S. 396, 404, the Atomic Energy Act "clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the Act." Accordingly, the Commission has established limits for releases of radioactivity to the environment. 10 C.F.R. Part 20, Appendix B.[38] But these effluent discharge limits can be attained only through specific NRC regulatory requirements which deal with such matters as plant siting and design, effluent monitoring, security, and environmental protection. 10 C.F.R. Parts 50, 51, 71, 73 and 100.

In the course of establishing liquid effluent requirements for a particular facility, the NRC must, of course, consider many other safety requirements which

[36] "Congress * * * enact[ed] a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel* v. *Atomic Energy Commission*, 400 F.2d 778, 783 (C.A.D.C.)

[37] The Joint Committee on Atomic Energy frequently examines the adequacy of these procedures. *E.g.*, Hearings on AEC Licensing Procedure and Related Legislation before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 92d Cong., 1st Sess. (1971).

[38] In addition to enforcing the Part 20 release limits, the NRC requires that nuclear facilities be designed to ensure that levels of radioactive materials in effluents are as low as practicable. See pp. 21–25, *supra.*

must be satisfied before a nuclear facility may be licensed. Decisions regarding the type and amounts of radioactive waste that may be discharged from a plant, and the extent to which any of these discharges may be to the air or water, necessarily must take into account the design and operation of the plant. All these decisions together must produce a safe and efficient plant, with discharges which will not adversely affect either the public health and safety or the environment. As the court stated in *Northern States Power Co.* v. *Minnesota, supra,* 447 F.2d at 1153 affirmed, 405 U.S. 1035, "regulation of the radioactive effluents discharged from a nuclear power plant is inextricably intertwined with the planning, construction and entire operation of the facility."[39] Accordingly, it would be inconsistent with the legislative policy expressed in the Atomic Energy Act to conclude that the authority to regulate such discharges is now the primary responsibility of EPA[40] and it would be sur-

[39] The agreed statement of facts submitted to the district court in the case was to the same effect. 447 F.2d at 1149 n. 6.

[40] The temperature of the effluent can be lowered by cycling it through cooling towers or retaining it in cooling ponds before it is discharged into national waters. Thus, control over the heat of effluents is not so closely tied to the planning, construction and operation of the plant, and the fact that such controls are within the jurisdiction of EPA under the FWPCA is not inconsistent with the intent of the Atomic Energy Act. Despite respondent's suggestion (Brief in Opp. 13), the fact that other agencies regulate the transportation and packaging of radioactive materials concurrently with the NRC is even less significant. Such regulations, designed to assure the integrity of the packaging and protect transportation facilities, do not have any significant impact on the planning, construction, or operation of nuclear facilities.

prising indeed if Congress contemplated such a result without careful consideration of the matter.

This is not to say that EPA has no responsibilities in this area. The Environmental Protection Agency was established by Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U.S.C. App., p. 609. That plan transferred to the EPA "[t]he functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended* * * [which] consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries or locations under the control of person possessing or using radioactive material" (Sec. 2(a)(6), 84 Stat. 2088, 5 U.S.C. App., p. 610) In his message accompanying the Plan, the President emphasized that the AEC was to "retain the responsibility for the implementation and enforcement of radiation stands through its licensing authority." 5 U.S.C. App., p. 612. Thus, the lines of authority were clearly drawn: EPA was to set generally applicable radiation standards, limiting the total amount of permissible radiation

[41] See EPA Proposed Standards for Environmental Radiation Protection for Nuclear Power Operations, 40 Fed. Reg. 23419 (May 29, 1975).

in the environment from major categories of sources,[41] while the AEC was to prescribe the limitations applicable to discharges of licensed materials from particular sources which contribute to the total."[42]

This division of authority requires close cooperation between the two agencies, lest AEC license discharges resulting in degradation of the environment in excess of standards established by EPA, or EPA establish standards so stringent that they would require the AEC to impose unattainable limitations on discharges from nuclear facilities. See, *e.g.*, AEC–EPA Memorandum of Understanding concerning environmental protection and control of radiation effects, 38 Fed. Reg. 24936 (September 11, 1973).[43] But carefully avoids, in the words of the FWPCA, the "needless

[42] See also the statement by the President's Director of the Office of Management and Budget on December 7, 1973. Ash memorandum, attached to court of appeals brief of Arkansas, *et al.*, pp. 35–36. Accord, 119 Cong. Rec. H11749–H11750 (daily ed. December 19, 1973).

[43] Cf. Executive Order 11752, 3A C.F.R. (1973 Comp.), pp. 240, 244, providing for the prevention, control, and abatement of environmental pollution at federal facilities, in furtherence of, *inter alia*, the FWPCA. The order requires all federal agencies to assure that their facilities conform to: "Federal guidance on radiation and generally applicable environmental radiation standards promulgated or recommended by the Administrator [of EPA], and adopted in accordance with the Atomic Energy Act, as amended (42 U.S.C. 2011), and rules, regulations, requirements, and guidelines on discharges of radioactivity as prescribed by the Atomic Energy Commission."

duplication and unnecessary delays" (33 U.S.C. (Supp. III) 1251(f)) which would be involved if both agencies attempted to license the discharge of the same materials to achieve the same ends.

No discernible public policy would be served by requiring both NRC and EPA to regulate the same discharges. Congress knew full well that regulation of the same subject by separate federal agencies, and the consequent problems that might arise from varying requirements, each aimed at achieving the same goal in a different way,[44] would be particularly undesirable in regard to radioactive material used, produced and discharged from nuclear facilities. Cf. *Gordon* v. *New York Stock Exchange, Inc.*, No. 74–304, decided June 26, 1975, slip op. 29–30. Both the comprehensive regulations of special nuclear, source and byproduct materials required by the Atomic Energy Act and the

[44] Although the Atomic Energy Act provides for limited state cooperation in the control of NRC-licensed materials (42 U.S.C. 2021), the states are precluded from exercising regulatory controls over the discharge of NRC-licensed materials from production or utilization facilities (terms which include nuclear power plants). 42 U.S.C. 2021(c); *Northern States Power Co.* v. *Minnesota*, *supra*. This limitation reflects a specific Congressional judgment when the new section was added to the Atomic Energy Act in 1959 (73 Stat. 688) that the control of radioactive effluents from production and utilization facilities should remain with the agency responsible for licensing the design, construction, and operation of these facilities.

In contrast, the FWPCA emphasizes the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. (Supp. III) 1251(b).

regulation of pollutants under the FWPCA have as a primary purpose the protection of the public health and safety.[45] Indeed, under both, a basic approach followed by the agencies concerned is to require the use of the best technology-related standards to control materials in effluent discharges. See pp. 26–27, *supra*. In addition, like all federal agencies, NRC and ERDA must consider the environmental effects of their activities. 42 U.S.C. 4331 *et seq.*; *Calvert Cliffs' Coord. Com.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A.D.C.).

If the EPA decided under a redundant regulatory system such as that ordered by the court below, to impose the same standards as NRC, the result would simply be unnecessary duplication of effort.[46] In the absence of any showing that NRC review is inadequate (Pet. App. 21a), or that Congress believed it to be so (1 Leg. Hist. 544–557; 119 Cong. Rec. H11749–H11750 (daily ed., December 19, 1973)), the FWPCA should not be interpreted to require such an unreasonable result. Cf. *United States* v. *American Trucking Ass'ns*, *supra*, 310 U.S. at 543.

[45] The Atomic Energy Act repeatedly emphasizes the requirement for consideration of the public health and safety. See 42 U.S.C. 2013(d); 2073(b); 2073(e)(7); 2093(b); 2099; 2111; 2133(b); 2134; 2201(b); 2232(a); 2236(c).

[46] Moreover, it is at best inefficient to separate decisions concerning the amount of discharge of radioactive materials into water from decisions concerning the design of the facility and its discharges of airborne and solid radioactive materials, all of which are interrelated. Cf. note 40, *supra* re thermal discharges).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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